

93-252

DOCKET FILE COPY ORIGINAL
LUKAS, MCGOWAN, NACE & GUTIERREZ EX PARTE OR LATE FILED
CHARTERED

RUSSELL D. LUKAS
GERALD S. MCGOWAN
DAVID L. NACE
THOMAS GUTIERREZ
ELIZABETH R. SACHS
GEORGE L. LYON, JR.
PAMELA L. GIST
MARCI E. GREENSTEIN+
DAVID A. LAFURIA
BOB J. GOLDBERG
J. JUSTIN MCCLURE++
MARILYN I. SUCHECKI+++
HOPE HALPERN+

+ ADMITTED IN PENNSYLVANIA ONLY
++ ADMITTED IN MISSISSIPPI ONLY
+++ ADMITTED IN MASSACHUSETTS ONLY

1819 H STREET, N.W.
SEVENTH FLOOR
WASHINGTON, D.C. 20006

January 26, 1994

CONSULTING ENGINEERS
THOMAS G. ADCOCK, P.E.
MEHRAN NAZARI
ALI KUZEHKANANI
SHAHRAM HOJATI, DSC.
JAMES R. LANDOLL, P.E.
LEROY A. ADAM

(202) 857-3800

TELECOPIER
(202) 842-4485

WRITER'S DIRECT DIAL
(202) 828-9471

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

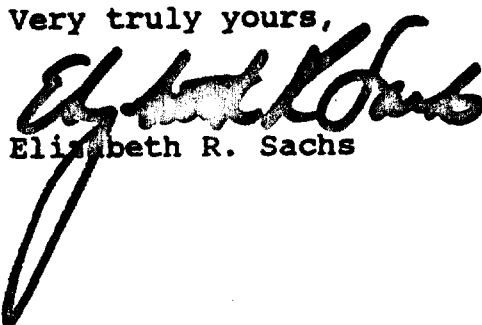
Re: **PETITION FOR SPECIAL RELIEF
CONCERNING ENHANCED SPECIALIZED
MOBILE RADIO APPLICATIONS AND
AUTHORIZATIONS BY BELL ATLANTIC
MOBILE SYSTEMS, INC.**

Dear Mr. Caton:

On behalf of the American Mobile Telecommunications Association, Inc., enclosed herewith please find its Opposition to the Petition filed by Bell Atlantic Mobile Systems, Inc.

Kindly refer any questions or correspondence to the undersigned.

Very truly yours,


Elizabeth R. Sachs

ERS:cls

Enclosure

No. of Copies rec'd
List ABCDE

2 copies

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554


In the Matter of)
)
Bell Atlantic Mobile)
Systems, Inc.)
)
Petition for Special Relief)
Concerning Enhanced Specialized)
Mobile Radio Applications And)
Authorizations)

To: The Commission

**OPPOSITION OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

Respectfully submitted,

**AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.**

By: 
Alan R. Shark, President
1150 18th Street, N.W. Suite 250
Washington, D.C. 20036

Of Counsel:

Elizabeth R. Sachs, Esq.
Lukas, McGowan, Nace & Gutierrez
1819 H Street, N.W., Suite 700
Washington, D.C. 20006
(202) 857-3500

January 26, 1994

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association") respectfully submits its Opposition to the Petition for Special Relief ("Petition") filed by Bell Atlantic Mobile Systems, Inc. ("BAMS") regarding the transition period for the conversion of so-called "Enhanced Specialized Mobile Radio" or "ESMR" systems from private land mobile to commercial mobile service ("CMS") classification.¹ The BAMS Petition is an unauthorized, belated attempt to secure from the FCC a regulatory advantage which was rejected by Congress: the immediate, and administratively unworkable, flash cut conversion of certain private land mobile systems to CMS status. Approval of BAMS' request to designate ESMRs as CMS immediately would be inconsistent with the legislative directive to provide a three-year timeframe for the orderly transition of those private services which will be designated as CMS. It would impede implementation of a fully competitive CMS marketplace by stunting, and perhaps precluding, the development of additional service providers. Further, it would immerse the Commission in an administrative morass of conflicting regulatory schemes and jurisdictional battles with no compensatory public interest benefit. For these reasons,

¹Petition for Special Relief Concerning Enhanced Specialized Mobile Radio Applications, filed December 22, 1993. Despite the Association's obvious interest in the subject matter of the pleading, BAMS elected not to serve AMTA or, apparently, any other affected party. The Petition has not been placed on public notice for the solicitation of comments from interested parties. Instead, it appears that the FCC is treating the BAMS Petition as late-filed comments in the agency's ongoing proceeding regarding implementation of CMS. See, Notice of Proposed Rulemaking, Treatment of Mobile Services, 8 FCC Rod 7988 (1993) ("CMS Rulemaking"). Assuming the Commission has determined to accept this unauthorized late-filed pleading as part of the record in that proceeding, and because the public interest will be served by a full discussion of this matter, AMTA requests that the FCC waive Section 1.45 of the agency's rules, if necessary, and also accept the instant Opposition.

and as described more fully below, the BAMS Petition should be dismissed and the transition period for private service conversion to CMS affirmed.

I. INTRODUCTION

AMTA is a nationwide, non-profit trade association representing the private carrier land mobile industry. Its members include operators of trunked and conventional 800 MHz and 900 MHz SMR systems, ESMR licensees, and both licensees and tentative selectees of 220 MHz private carrier systems.

On behalf of those members, the Association participated actively, along with other interested land mobile organizations, in the legislative process which culminated in enactment of the Omnibus Budget Reconciliation Act ("Act").² AMTA endorsed the Act's amendment of Sections 3(a) and 332 of the Communications Act of 1934, as amended, to create a comprehensive framework for the regulation of mobile radio services. The Association agreed with the fundamental premise of those amendments: functionally equivalent services should be regulated in like fashion to promote full and fair competition. It is AMTA's belief that Congress also recognized clearly the need to establish an appropriate migration path for the conversion of heretofore private systems with the potential to become functionally equivalent with cellular services to the new, common carrier CMS category. It is that Congressionally-mandated transition period, a provision which was supported by all industry participants in the legislative process, which BAMS now seeks to frustrate.

²Pub. L. No. 103-66, Title VI, § 6002(c), 107 Stat 312 (1993).

II. OPPOSITION

A. BAMS Has Not Demonstrated that ESMR is a "New Service" Not Entitled to the Statutory Transition Period.

The sole basis for BAMS' Petition is its contention that ESMR is a new service, not offered as of August 10, 1993, and, thus, is not entitled to the three-year transition period. BAMS alleges that ESMR is "a distinct and relatively new phenomenon, first authorized in 1991 and first provided in late August, 1993." Petition at 5. It further claims:

Neither the date on which the Commission adopted rules or policies governing a service, nor the date on which licenses were first issued has any relevance for purposes of determining whether the exemption is applicable. *Id.*

At the outset, AMTA would note that ESMR is not a "service" at all. It is an acronym coined by Nextel Communications, Inc. ("Nextel"), (formerly Fleet Call, Inc.), which is sometimes used by the press and the financial community, but far less frequently by the SMR industry itself, as a shorthand label for all digital SMR systems proposing to employ frequency reuse in a multi-site system configuration.³ The term is found nowhere in the FCC Rules or on the authorizations issued by the Commission to applicants for authority to implement systems with those system design characteristics. These systems are processed and granted as SMRs, a defined FCC radio service category, in accordance with existing FCC rules and policies governing the SMR service.

³For convenience's sake, the term ESMR will be used in the instant Opposition to include all digital SMR systems characterized by frequency reuse and multiple sites.

The record on this point is unambiguous. The Commission's Order granting Nextel's original request for ESMR authority specifically concluded that the proposal did not constitute a request for a new service:

We reject this line of reasoning. The Commission's current rules and policies permit a multiple base station digital configuration for SMRs. Furthermore, the services that Fleet Call will provide in its enhanced networks are not functionally different from any service that it currently provides through its existing stations . . . Given that digital technology and multiple base station configurations are also permitted under current rules, we must conclude that Fleet Call's proposal does not create a de facto new service.⁴

BAMS has presented no evidence reflecting this conclusion. The enhancements in system quality, capacity and coverage to which the Petition refers are expected to flow from the technologically superior equipment and reconfigured system designs being implemented by operators such as Nextel. Petition at 6. These improvements, however, have already been determined to be permissible under the FCC's existing, sagaciously flexible regulatory scheme. They do not constitute the basis for classifying what BAMS labels ESMR as a distinct, new service.

Indeed, if the FCC were to follow the Petition's line of reasoning, the agency would be required to classify each individual private land mobile station as private or CMS, based on the data on which service was initiated from that station since BAMS claims that neither the date that the service was approved by the FCC nor the date on which a license was issued should be determinative. Petition at 5. Adoption of this analysis would deny the transition period to all private land mobile licensees which

⁴Fleet Call, Inc., 6 FCC Rcd 1533 (1991), recon. denied, 6 FCC Rcd 6989 (1991) ("Fleet Call Order") at 1537.

initiated service on a particular station after August 10, 1993, not just ESMRs. This is the only logical result of accepting BAMS' theory that neither the date the FCC authorized the generic service being provided by the licensee nor the date on which the licensee was authorized to provide that service are determinative of status.

The BAMS theory attempts to prove both too little and too much. The Petition offers no support for its claim that what it calls ESMR is a new service beyond the parameters of the transition period. Having failed to do so, it advances an analysis which would immediately reclassify as CMS all private systems initiating service after the relevant date. As described below, the administrative chaos that would result from the bifurcation of integrated systems with multiple station authorizations and service initiation dates into totally different regulatory schemes was not intended by Congress and should not be sanctioned by the FCC.

B. The Congressional Directives Regarding Implementation of CMS Support a Three-Year Transition Period For All Private Land Mobile Services and Systems.

There is no dispute that Congressional amendments were needed to create a more logical and comprehensive regulatory structure for the mobile radio, the wireless services. The private/common carrier delineation enacted by Congress in 1982 had outlived its usefulness in defining an environment characterized by ever-increasing competition and emerging functional equivalencies between what had been designated as private versus common carrier systems. The need to ensure regulatory parity for systems capable of providing functionally equivalent services in the marketplace is fully supported

by AMTA.⁵

Further, both AMTA and the ESMR industry generally have acknowledged that the regulatory status of ESMR systems will presumably be changed to CMS after the transition period.⁶ The reconfiguration of these systems, and their deployment of advanced technologies, are expected to enable them to provide a service comparable to that offered on cellular systems. On that basis, and as that functional equivalency is accomplished, they will properly be classified as CMS.⁷

Nonetheless, Congress clearly recognized the complexity of migrating systems from private to CMS/common carrier status, both for the licensees and for the FCC itself. The legislation sets out a carefully defined path and timetable for the Commission to follow in this regard. It requires the FCC to complete a rulemaking within one year modifying both the private and common carrier rules in anticipation of the subsequent conversion of certain private systems to common carrier status.⁸ There are numerous differences in the private versus common carrier land mobile regulatory schemes which will require reconciliation. Until these modifications are implemented, there is no

⁵The Association would point out that BAMS' claim of an unfair regulatory "tilt" in favor of SMRs, as opposed to cellular, under today's rules, mischaracterizes the relative advantages to and burdens on each. See, Nextel Opposition to BAMS Petition, FN 24.

⁶See, e.g. CMS Rulemaking, Comments of AMTA, Nextel, Dial Page, Inc., CenCall, Inc.

⁷AMTA's positions on which private systems should be so classified and other matters relating to FCC implementation of the legislative directives are detailed in the Association's Comments in the CMS Rulemaking. That proceeding is also the appropriate forum in which to debate the appropriate equal access requirements for various CMS systems.

⁸~~Act~~ Section 6002(d) (3). By contrast, the rules governing PCS regulatory status are mandated for completion on a more accelerated timetable.

regulatory structure specified for CMS. The reclassification of systems prior to completion of that proceeding would leave them in a regulatory limbo -- a result that could not have been intended by Congress.

Instead, the legislation clearly contemplates a sequential process whereby the existing rules are modified, licensees in those private services which have been classified as CMS have an opportunity to structure their business arrangements and marketing plans in anticipation of adapting to a totally different regulatory environment, and systems are subsequently made subject to the newly adopted CMS rules. This thoughtful approach establishes a logical migration path for the affected participants and for the industry. By contrast, the BAMS Petition proposes a flash cut, unintended by Congress, without any rational recommendation as to how it might be implemented. The Petition is totally at odds with the legislative intent and clear directives. It should be dismissed.

C. The Three-Year Transition Will Enhance a Competitive CMS Marketplace

The legislative enactment of a three-year transition period for heretofore private systems to CMS status is consistent with the objective of promoting robust competition in the developing wireless industry. The FCC itself has recognized previously that entities in the same marketplace, but at different levels of development and market penetration, may require differing regulatory approaches on an interim basis until such time as full competition has been achieved.⁹ The ESMR industry is well on its way to achieving the degree of functional equivalency with cellular that will enhance

⁹Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993).

substantially competitive activity in what is currently a duopoly environment. The transition period mandated by Congress is a critical ingredient in attaining that objective, which will be of significant benefit to all current and prospective customers of what will be considered CMS systems.

D. The Administrative Difficulties Associated With the BAMS Petition Are Incalculable

The BAMS Petition is silent regarding the administrative mechanics of adopting the position it espouses. This silence, in its otherwise impassioned plea, speaks volumes. BAMS' objective is not to assist in the transition of ESMR (and, under the Petition's analysis, numerous other private stations) from private to CMS status, but to impede the further implementation of ESMR and other prospectively competitive operations.

The objective is clear throughout the Petition. It is highlighted in BAMS' recommendation that the FCC both reclassify ESMR service as CMS and defer action on any pending applications to establish or modify such systems until the regulatory structure for CMS has been implemented. Petition at 8. Adoption of this approach would leave all ESMR systems in a regulatory vacuum for an extended period of time. They would be unable to relocate a site, raise or lower an antenna, or secure any of the other regulatory approvals needed to implement a dynamically evolving system design. The anti-competitive nature of this proposal is transparent and should be rejected out of hand.

The BAMS proposal is equally untenable from the perspective of administrative oversight by the FCC. The existing private land mobile licensing scheme is predicated on the issuance of individual authorizations, or call signs, for each site, even in an

integrated system.¹⁰ Since BAMS argues that status is determined, not by when the FCC authorized a particular service or the date a license was issued, but by the date on which service was initiated, systems with more than a single location or frequency could be subject to a bifurcated regulatory structure. Integrated operations could be part private and part CMS throughout the three-year transition. The CMS portion of the system would be in regulatory limbo until CMS rules are implemented, while the private portion would be frozen in its current configuration or risk reclassification. Under the Commission's existing structure, some of the system might fall within the jurisdiction of the Private Radio Bureau, with the rest under Common Carrier Bureau auspices. This nonsensical, administratively inefficient, and anti-competitive result is entirely inconsistent with Congressional intent or any notion of the public intent. It must be rejected.

III. CONCLUSION

The BAMS Petition is a blatant attempt to impede competition by mischaracterizing a legislative directive which had been endorsed by all industry participants. The fundamental premise of the argument -- that ESMR is a new service distinct from traditional SMR -- has been unambiguously rejected by the Commission. That decision is no longer subject to review. BAMS' recommendation that the service initiation date be determinative of a station's regulatory status is at odds with the

¹⁰Under certain circumstances, private licensees may include up to six locations on a station license issued under a single call sign. This is not true for ESMRs, or even "traditional" SMRs, which are granted individual licenses with distinct call signs for every location at which they operate.

migration path established in the legislation and would result in regulatory gridlock, which would benefit not the public, but BAMS individually.

The Commission's mandate is clear. Its responsibility is to promote competition and thereby the public interest. It will do so by following the transition timetable specified in the legislation which will itself enhance the likelihood of robust competition in the wireless marketplace.

For the reasons described herein, the BAMS Petition should be summarily dismissed.

CERTIFICATE OF SERVICE

I, Cheri L. Skewis, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 26th day of January, 1994, caused to have hand-delivered or first-class mailed, a copy of the foregoing Opposition of the American Mobile Telecommunications Association to the following:

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20036

The Honorable James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20036

The Honorable Ervin S. Duggan
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20036

The Honorable Andrew C. Barrett
Commissioner
Federal Communications Commission
1919 M Street, NW Room 826
Washington, DC 20036

David H. Solomon, Esquire
Assistant General Counsel
Office of General Counsel
Federal Communications Commission
1919 M Street, NW, Room 614
Washington, DC 20036

Karen Brinkmann, Esquire
Special Assistant to the Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20036

Ronde Licht, Esquire
Special Assistant to the Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20036

Brian F. Fontes
Senior Advisor
to Commission Quello
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20036

Byron F. Marchant, Esquire
Senior Legal Advisor
to Commissioner Barrett
Federal Communications Commission
1919 M Street, NW Room 826
Washington, DC 20036

Kathleen Levitz, Acting Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20036

Ralph A. Haller
Chief, Private Radio Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20036

Beverly G. Baker
Deputy Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, NW, Room 5002
Washington, DC 20036

Rosalind K. Allen
Chief, Rules Branch
Private Radio Bureau
Federal Communications Commission
2025 M Street, NW, Room 5202
Washington, DC 20036

John Cimko, Jr.
Chief, Mobile Services Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 644
Washington, DC 20036

Gerald P. Vaughan
Deputy Bureau Chief, Operations
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20036

Stuart F. Feldstein, Esquire
Fleischman & Walsh, P.C.
1400 16th Street, NW
Washington, DC 20036

James R. Young, Esquire
Bell Atlantic Network
Services, Inc.
1710 H Street, NW, 8th Floor
Washington, DC 20006

Robert Foosaner, Esquire
Nextel Communications, Inc.
201 Route 17 North
Rutherford, NJ 07070

Emmett B. Kitchen
National Association of Business &
Educational Radio, Inc.
1501 Duke St., Suite 200
Alexandria, VA 22314

Michael Kennedy
Motorola, Inc.
1350 Eye Street, NW, Suite 400
Washington, DC 20005


Cheri L. Skewis